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No. 85-527

In the Supreme Court of the United States

OCTOBER TERM, 1985

FAITH CENTER, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission properly exercised its discretion in dismissing renewal applications for broadcast licenses because the licensee (a religious organization) failed to comply with discovery orders for information relevant to an inquiry into allegations of fraudulent solicitation of funds which, if substantiated, could have disqualified the renewal applicant.

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OPINIONS BELOW

The orders of the Federal Communications Commission denying review are unreported and are set forth at Pet. App. 5a-12a. The judgments of the court of appeals affirming those orders without opinion are unreported and are set forth at Pet. App. 1a-4a.

JURISDICTION

The judgments below (Pet. App. 1a-4a) were entered on May 9, 1985. Rehearing in the Los Angeles proceeding was denied on July 2, 1985 (Pet. App. 53a); rehearing in the San Francisco proceeding was denied on July 8, 1985 (Pet. App. 52a). The petition for a writ of certiorari was filed on September 26, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case challenges the dismissal by the Federal Communications Commission (FCC) of the renewal applications for two of petitioner's broadcast licenses.[1] The FCC has previously dismissed a renewal application for another broadcast license held by petitioner on the same grounds. See *Faith Center, Inc. Station KHOF-TV*, 82 F.C.C. 2d 1 (1980), reconsideration denied, No. FCC 81-835 (May 12, 1981), aff'd by judgment, 679 F.2d 261 (D.C. Cir. 1982) (Table), cert. denied, 459 U.S. 1203 (1983) [hereinafter cited as the San Bernardino proceeding].

1. In 1977, the FCC began an investigation into the broadcast operations of a television station licensed to petitioner after it had received allegations from a former employee of petitioner that the licensee had solicited funds over-the-air which were not used for the purposes described in the broadcasts. The investigation was necessary to determine whether petitioner had violated the federal wire fraud statute, 18 U.S.C. 1343, which prohibits the use of broadcast facilities for the purpose of carrying out "any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations or promises."[2] After petitioner failed to cooperate in the investigation, the FCC designated for hearing petitioner's renewal application for its San Bernardino station, KHOF-TV. See 47 U.S.C. 309(a) and (e). Petitioner refused to supply information in response to discovery orders that would have aided in resolving the questions concerning its

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[1] In addition to being a broadcast licensee, petitioner is a non-denominational Christian church headquartered in California.

[2] The FCC has authority, pursuant to Section 312(a)(6) of the Communications Act, 47 U.S.C. 312(a)(6), to determine whether a broadcast station has violated 18 U.S.C. 1343.

qualifications to be a broadcast licensee.[3] Consequently, the FCC dismissed petitioner's renewal application. *Faith Center, Inc. Station KHOF-TV, supra.*

In its opinion, the FCC considered at length petitioner's arguments that the Constitution forbade the FCC's inquiry into its broadcast operations. 82 F.C.C. 2d at 17-21.[4] The FCC observed that, by seeking and obtaining a broadcast license, petitioner had subjected itself to the same public interest obligations under which any broadcast licensee, religious or otherwise, operates. 82 F.C.C. 2d at 20, citing *King's Garden, Inc.* v. *FCC*, 498 F.2d 51, 60 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974). Moreover, the FCC noted that "solicitation, as a form of conduct, may be subject to government regulation of numerous types including regulation designed to prevent fraud on the public." 82 F.C.C. 2d at 18, citing *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304 (1940).

The court of appeals affirmed the FCC's decision without opinion (679 F.2d 261 (D.C. Cir. 1982)), and this Court denied certiorari (459 U.S. 1203 (1983)).

2. Since the FCC had been unable in the San Bernardino proceeding to resolve the questions concerning petitioner's qualifications to be a licensee, it designated for hearing petitioner's renewal applications for its Los Angeles radio

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[3]The FCC, through its Broadcast Bureau, sought, inter alia, videotapes of the programs on which funds were solicited, accounts receivable ledgers, lists of solicitations and moneys received, and records of money spent on each project for which funds were solicited.

[4]The FCC had also addressed petitioner's constitutional objections during the pre-hearing investigation. 69 F.C.C. 2d 1123, 1126-1127 (1978).

station, 89 F.C.C. 2d 1054 (1982), and San Francisco television station, 90 F.C.C. 2d 519 (1982).[5] At the pre-hearing conference in the Los Angeles proceeding, petitioner's counsel stated that it would not comply with discovery or deposition requirements in the proceeding (83-2295 C.A. App. 28). Petitioner also indicated that it would not make its president, officers or directors available for depositions (83-2295 C.A. App. 51-52). The administrative law judge warned petitioner that failure to participate in discovery could result in disqualification, as in the San Bernardino proceeding (83-2295 C.A. App. 32, 62, 65), but he nonetheless gave petitioner an opportunity to file a brief setting forth its constitutional arguments.[6]

Petitioner's subsequent actions in the Los Angeles and San Francisco proceedings confirmed the position it took at the pre-hearing conference that it would not comply with discovery orders. In the course of those proceedings, the FCC's Broadcast Bureau sought from petitioner the same information it had unsuccessfully sought in the San Bernardino proceeding, including the videotapes of broadcasts containing solicitations for funds (83-2295 C.A. App. 105); (84-1085 C.A. App. 5061).[7] The responses received (83-2295 C.A. App. 936-1203, 1342-1373; 84-1085 C.A. App. 5378-5899) were simply resubmissions of the information submitted in the San Bernardino case (without even changes in the

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[5]In contrast to the San Bernardino case, which involved only petitioner, each of the two new proceedings also involved competing applicants for the frequencies. See *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945).

[6]Petitioner filed that brief on June 30, 1982 (83-2295 C.A. App. 675).

[7]The FCC also sought additional information relating to misrepresentation and abuse of process issues arising out of petitioner's actions in the San Bernardino proceeding (83-2295 C.A. App. 96-101; 84-1085 C.A. App. 5067). Petitioner never submitted information responsive to these issues.

captions), where the FCC had determined, with court approval, that petitioner's response was inadequate.[8] Thus, consistent with the result in the San Bernardino proceeding, the FCC dismissed petitioner's renewal applications for these two stations (Pet. App. 5a, 7a).

The court of appeals affirmed the FCC in both cases, again without opinion (Pet. App. 1a, 3a).

ARGUMENT

The decisions of the court of appeals are correct and do not conflict with the decisions of this Court or any other court. To the contrary, the decisions are entirely consistent with earlier cases involving the obligations of a broadcast licensee, including the decision in the San Bernadino case involving petitioner's similar lack of compliance with FCC orders. Thus, this case does not warrant further review.

Petitioner contends here, as it did in the San Bernardino case, that the FCC dismissed its renewal applications in violation of its First Amendment right to the free exercise of religion. The Court denied the petition for a writ of certiorari in the San Bernardino case, and neither petitioner nor the intervenors supporting the petition have identified anything in the instant cases—which involve precisely the same behavior by petitioner and the same action by the FCC—to warrant a different outcome here.

Petitioner's claim is, in any event, without merit. This Court stated in *United States* v. *Lee*, 455 U.S. 252, 261 (1982):

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[8] In this Court, Intervenor Scott, in asserting that Faith Center "cooperated fully with the FCC" (at 7), relies on part of the joint appendix in the San Bernardino proceeding that Faith Center refiled in the San Francisco case (84-1085 C.A. App. 1707-1874); the depositions of Faith Center's attorneys, to which Scott also refers (at 8), were taken by counsel for Faith Center in the San Bernardino proceeding (84-1085 C.A. App. 3320, 3747).

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in the activity.

Applying that principle to the particular context involved here:

> A religious group, like any other, may buy and operate a licensed radio or television station. * * * But, like any other group, a religious sect takes its franchise "burdened by enforceable public obligations."

King's Garden, Inc. v. *FCC*, 498 F.2d at 60, quoting *Office of Communication* v. *FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966). Those obligations include the duty to cooperate with an FCC investigation undertaken after the Commission had received complaints that funds solicited over-the-air for identified projects were in fact not used for those projects. See 18 U.S.C. 1343; 47 U.S.C. 312(a)(6). This cooperation was necessary because once serious public interest questions were raised concerning petitioner's operations, the FCC had an affirmative duty to resolve them before it could determine whether the license renewal applications could be granted. 47 U.S.C. 309(a) and (e).[9]

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[9]The Ninth Circuit, in a suit brought by petitioner's president, has held that the FCC's inquiry served a compelling government interest in preventing diversion of funds obtained through the use of the public airwaves, and that the investigation "was narrow and avoided any unnecessary interference with the free exercise of religion." *Scott* v. *Rosenberg*, 702 F.2d 1263-1274, 1275 (9th Cir. 1983), cert. denied, 465 U.S. 1078 (1984). Although Intervenors (Johnson at 12; Scott at 6, Wescott at 9) now suggest that the information the Commssion received did not provide a sufficient basis to initiate an inquiry, the Ninth Circuit specifically determined in that case that the Commission had sufficient reliable information to justify its inquiry. 702 F.2d at 1275.

Petitioner erroneously implies that this case involved the loss of a broadcast license solely because of the licensee's unwillingness, on religious grounds, to divulge the names of donors (Pet. 16-17). The FCC never required petitioner to disclose the names of members of the public who contributed funds to it (see Pet. App. 10a; 82 F.C.C. 2d at 3 n.6; 69 F.C.C. 2d at 1127 n.1). In fact, the FCC's Broadcast Bureau, whose discovery requests petitioner claims sought such information, specifically disclaimed any present intention of requiring the disclosure of donors' names (83-2295 C.A. App. 1612, 2667).[10] But even if we assume arguendo that the Bureau's interrogatories could be construed to have sought the names of donors, petitioner would still not be entitled to relief. Virtually all of the relevant discovery requests concerned information that clearly did not require the disclosure of the names of donors (see note 3, *supra*), yet petitioner failed to respond adequately to any of the information requests.[11] Thus, this is not a case in which a

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[10]Petitioner (Pet. 10-11) and Intervenor Scott (at 12) contends that Faith Center offered to provide certain documents to the FCC with the names of donors deleted. They rely for this contention on an affidavit from an individual who was neither a party nor counsel to a party, executed months after the FCC proceedings had ended, in which the affiant alleges that, in a private meeting with the Broadcast Bureau, the Bureau rejected the affiant's attempt to settle the case by arranging for the submission of edited documents (83-2295 C.A. App. 2947). If petitioner was indeed willing to disclose certain relevant information on condition that donor names be deleted, and if, in its view, the Bureau wrongly rejected its offer, it should have raised this matter before the ALJ for a determination by him whether the offer was sufficiently responsive to the Bureau's discovery requests. Petitioner, however, never brought its alleged offer to the attention of the ALJ, nor to the attention of the Commission itself. See 47 U.S.C. 405. Moreover, the information which petitioner now claims it was willing to disclose under certain protective conditions was only a small part of the materials petitioner had refused to disclose.

[11]For example, the videotapes of programs on which broadcast solicitations were made would not require petitioner to reveal confidential names of donors, yet were particularly relevant to a determination of

broadcaster otherwise cooperated with the FCC and invoked the First Amendment solely for the limited purpose of withholding donor records from the FCC. Instead, petitioner "was playing the dodger to serious charges." *RKO General, Inc.* v. *FCC*, 670 F.2d 215, 238 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982).

Petitioner also contends that it should have been afforded an opportunity to obtain a ruling on its constitutional claims prior to the imposition of sanctions (Pet. 17, 20). This assertion overlooks the thorough consideration of petitioner's arguments in the San Bernardino proceeding, not only before the FCC (69 F.C.C. 2d at 1126-1127; 82 F.C.C. 2d at 17-21), but also in a full proceeding in the court of appeals and a petition for certiorari in this Court.[12] Thus,

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what, if any, specific use was promised for the funds received—the obvious starting point for an inquiry into whether the funds were then spent for those specified purposes.

Intervenor Wescott suggests (at 10) that Faith Center was not obliged to turn over the videotapes because they were in Wescott's possession, and Wescott would not release the tapes to Faith Center. In light of the facts that (1) Dr. Scott was president of both Faith Center and Wescott (82 F.C.C. 2d at 28), (2) Faith Center and Wescott had the same officers and directors until midway through discovery in the San Bernardino proceeding (*id.* at 30 n.88), and (3) Dr. Scott appeared to have exercised physical control over at least some of the tapes in issue—including ordering that they be placed in an employee's appartment to avoid their being obtained by the FCC (*id.* at 28, 37-39)—the Commission in the San Bernardino decision properly rejected this line of reasoning as a "bad faith contrivance" (*id.* at 27).

Intervenor Wescott also asserts (at 10) that Faith Center did deliver certain videotapes to the FCC in the San Bernardino proceeding. But in the Los Angeles and San Francisco proceedings, the Commission sought videotapes of programs broadcast on specific dates (83-2295 C.A. App. 99, 105; 84-1095 C.A. App. 5067, 5062); those tapes were never produced (83-2295 C.A. App. 1607).

[12]In addition, more than twenty lawsuits have been filed in connection with some aspect of the FCC's actions by petitioner, its president or its members. To date, nineteen have been finally resolved, all of them unfavorably to petitioner.

any doubt concerning the obligation of petitioner, an applicant for renewal of its broadcast license, to cooperate with the FCC's efforts to determine whether renewal was warranted was put to rest well before the dismissals of petitioner's Los Angeles and San Francisco applications.[13] In any event, this Court has repeatedly recognized that dismissal is proper when a party to a proceeding refuses to comply with discovery orders. See, *e.g., National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976); *Link* v. *Wabash R.R.*, 370 U.S. 626 (1962).[14]

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[13]The Los Angeles and San Francisco proceedings were not initiated until after the court of appeals affirmed the dismissal of petitioner's San Bernardino renewal application for failing to supply information necessary to an informed decision on whether the public interest would be served by a grant of the application. Petitioner's application for Commission review of the dismissal of its Los Angeles application was filed more than three months after the Court denied certiorari in the San Bernardino case, and contained no indication that petitioner would change its position (83-2295 C.A. App. 2649). The ALJ's dismissal of the San Francisco application was not issued until a month after certiorari was denied in the San Bernardino case. Thus, petitioner had ample opportunity, after this Court's determination that the constitutional claims were not worthy of review, to abandon its previous resistance and follow a more cooperative course.

[14]The Commission has on a number of occasions in the past dismissed applications because the applicant has failed to comply with discovery requirements. See, *e.g., Vue-Metrics, Inc.*, 69 F.C.C. 2d 1049 (1978), aff'd by judgment, 615 F.2d 1369 (D.C. Cir. 1980) (Table); *Fletcher Broadcasting Corp.*, 41 Rad. Reg. 2d (P & F) 638 (1977); *J.B. Broadcasting*, 70 F.C.C. 2d 217 (Rev. Bd. 1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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